JOHORE REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J. (S.S.) HORNE, J. and PEDLOW, J.

September 26, 1938.

THE PUBLIC PROSECUTOR OF JOHORE .....Appellant

v.

GAN LIAN KEE.....Respondent

[JOHORE CRIMINAL APPEAL No. 7A of 1938]

Rubber Regulation Enactment 1937 (Amended by Enactments 18 and 28 of 1938)—Section 23—Prohibition of Planting—Exception—Replacement and Supply—Meaning of "thirty rubber plants on any acre" (formerly Section 23 (i), now Section 23 (ii) (c)).

There is nothing in Section 23 (i) of the Rubber Regulation Enactment 1937 (now Section 23 (ii) (c) to indicate how a portion of land described as "any one acre" is to be ascertained or to deprive an owner of the right to select the areas on which he replaces thirty trees. The Controller cannot select any area of any shape containing one acre on any part of a holding, such area having more than thirty replacements, for the purpose of charging an offence under the Enactment.

APPEAL from acquittal by the Magistrate at Muar referred by the Judge to Full Court of Appeal.

Abdul Hamid, Deputy Public Prosecutor, for Appellant.

M. V. Pillai for Respondent.

Cur. Adv. Vult.

The facts and arguments appear sufficiently from the Judgments below.

McELWAINE, C.J. & HORNE, J.—This appeal from an acquittal by a magistrate was referred by Mills J. to a Court of three Judges.

The respondent was charged "that he during or about the month of September to November 1937 planted rubber plants on lot 894 held under Grant 15745 Mukim Garsik in contravention of section 23 (i) of the Rubber Regulation Enactment of 1937, which is an offence under section 23 (iii) punishable under section 34 of the said Enactment."

Section 23 (i) of the Enactment is as follows:—

> "Subject to the provisions of this Enactment no rubber plants or seeds shall be planted so long as this Enactment remains in force, provided that, with the written permission of the Controller, limited areas may be planted for exclusively experimental purposes, or for nurseries. Nothing in this section shall be deemed to prohibit the planting of not more than thirty rubber plants or seeds on any acre of land which was in cultivation on the 1st day of June, 1934, to replace rubber plants which were formerly grown thereon and had not been planted in contravention of this Enactment."

This subsection contains a general prohibition of planting subject to two exceptions;

(1) the planting of not more than thirty rubber plants on any acre of land which was in cultivation on 1st June 1934 to replace rubber plants which were formerly growing thereon and had not been planted in contravention of this Enactment, is not prohibited;

(2) Replanting (which means planting more than thirty rubber plants on any acre of any holding carrying rubber plants on the 1st June 1934) with the approval of the Controller given in accordance with section 23 (ii).

Once it has been shewn that any planting has been done the onus is on the accused to bring himself under one or other of the two exceptions I have mentioned.

There is no question of the planting being covered by the second exception but the respondent says he is covered by the first exception.

In the Court below it was stated by counsel and repeated by the magistrate in his grounds of Judgment that the facts were not in dispute and the case was argued before us on this basis, the point in dispute being the meaning of "on any acre" or perhaps more correctly, who is to ascertain the particular acre and how is he to ascertain it on a holding which, like the present, contained an area of hundreds of acres.

Only one witness was called at the trial and that was Mr. Fildes, a senior rubber inspector.

As I understand his evidence there was in the centre of the rubber estate a swamp of 38 acres out of which approximately twenty acres had been replanted. Mr. Fildes counted the trees on 5¼ acres of the twenty and found that 861 trees had been replanted with 861 trees equivalent to 165 trees per acre. If this was the whole effect of Mr. Fildes' evidence, the legal point argued would be clearly before us, but it appeared from the evidence that on 15th August, 1934, a declaration was filed under the Enactment then in force stating that lot 894 contained 797 acres of which 730 acres were planted with rubber and upkept and 13 acres were planted with rubber and abandoned. This return stated the position as at 1st June 1934. Mr. Fildes referring to these 13 abandoned acres swore "this area has been also planted. At present there is no abandoned area, all the land has been replanted."

Now if this is correct an offence has been committed whatever meaning may be given to the words "any acre" because replacement is only allowed on any acre which was in cultivation on 1st June 1934 and as these 13 acres were abandoned they were not in cultivation on that date. I think land "in cultivation" means more than just land on which rubber trees are standing, or which, in the words of subsection (ii) is "carrying rubber plants;" and that land which has been abandoned is not land in cultivation.

In cross-examination Mr. Fildes said "the trees planted were in excess allowed" implying that a lesser number of trees might have been planted lawfully.

All the rest of the cross-examination and re-examination was directed, not to whether rubber had been planted on land which was out of cultivation on 1st June 1934 but, to whether the 861 trees could properly be said to be on five acres or on a larger number of acres and it appears to have been on this issue alone that Mr. Pillai and Davis (who conducted the prosecution) addressed the Court.

If I were satisfied that the charge and Mr. Fildes' evidence related so clearly to the replanting of the thirteen abandoned acres that the respondent and the Court must have had this in mind as an issue I would have no hesitation in convicting the respondent for replanting on abandoned ground.

But it appears to me that the real charge was planting on twenty acres out of the 38 acres of swamp details of which were given as to 5½ acres and I see nothing in Mr. Fildes' evidence to lead me to suppose that any part of the thirteen abandoned acres formed any part of the twenty acres which really seems to have been the subject of the charge. These thirteen acres seem to have been dragged in as a kind of make weight—evidence of system or something of the sort. If it was really a part of the charge, I would have expected Mr. Davis to have drawn attention to it in his address to the magistrate but he appears from the record not to have done so.

The case appears to have gone, not on whether trees were planted on land which was not under cultivation on 1st June 1934 but on whether more than twenty trees were replanted on any one acre.

Mr. Fildes in evidence said "I can circumscribe any area in any shape which contains an area of 4840 square yards which contained within its area more than thirty trees." It was on this proposition that the case was argued, and the case was dismissed because the magistrate held that the method of ascertaining any acre was equally open to the defendant. The Public Prosecutor sets out two grounds of appeal, the first makes no reference to replanting on uncultivated land, the second is "The learned trial magistrate was wrong in his interpretation of the words 'any acre of land' as to mean an acre of land measured in any shape." What the magistrate actually said in his grounds of decision was:—

> "The prosecution chose to measure the area as in Exhibit B and the Defence as in Exhibit 1. From Mr. Fildes' evidence in cross-examination an area of one acre could be measured in any shape, and by the measurement adopted by the Defence there would be fifteen trees to an acre. If that is so the defence was within their right and in my opinion section 23 was never contravened."

The only point argued of this appeal was, is it the prosecution or the defence who can "circumscribe" any area in any shape."

If the Prosecution claim is correct they can circumscribe a serpentine area an inch wide, bulging to include a tree, and makes this area include trees no one of which may be within a mile of another, yet if this fantastic figure is one acre and if the prosecution can get more than thirty replaced trees into the figure then they establish an offence.

Such a proposition appears to me to be absurd, particularly in a penal section and would enable the privilege which the Legislature has given to be defeated.

The space of ground actually selected by Mr. Fildes in this case as five and a quarter acres was not so fantastic in shape as the illustration I have suggested, but it is an irregularly shaped block of land chosen capriciously.

The defendant put in a plan shewing these 861 trees on 50 different acre plots which works out at a trifle over 17 to the acre. These acre plots were long strips, and we were informed that rubber estates are usually worked or tapped in strips, so the acres selected by the defendant as units of his estate may not have been so capriciously selected as those selected by Mr. Fildes.

As I understand section 23 three matters are dealt with:—

(1) planting, a word which includes planting on land which was not bearing rubber on 1st June 1934. Such planting is absolutely forbidden. Then come two limited kinds of planting;

(2) replacing, which permits up to thirty trees to be planted in substitution for thirty trees which had been lawfully growing at any time on any acre which was in cultivation on 1st June 1934. The owner may replace one tree on any one acre per year for

> thirty years or he may replace thirty trees in one year. The number that can be replaced is thirty and when thirty have been replaced the right implied in the second part of section 23 (i) is spent and gone for ever.

Then comes (3) the other limited kind of planting —replanting. 'Replant' is defined as "plant more than thirty rubber plants or seeds on any acre of any holding carrying rubber plants on the 1st June 1934." 'Replant' is not equivalent to replacing tree for tree. One may replant part of a holding provided one complies with section 23 (ii). The Controller may approve the replanting of a particular part or parts so long as not more than 10% of the holding is replanted in any one year and so that the total area replanted before 1st January 1939 is not to exceed 20% of the total holding planted with rubber on 1st June 1934. This does not allow replanting on a part of the holding not previously planted. But what is a part previously planted must be left to the discretion and common sense of the Controller. If the Controller regarded the land on which seventy particular trees were growing as a cultivated part he may permit that part to be replanted with two hundred trees.

Now I think it clear that in a case of replanting the Controller can demand particulars of the part proposed to be replanted and the Controller may, subject to the other provisions of section 23 (ii) approve the replanting of that part. So far therefore as replanting under subsection (ii) is concerned it takes place on a part of the holding which is definitely ascertained before the planting is done.

So far as replacing under subsection (i) is concerned there is nothing to indicate how a portion of land described as "any one acre" is to be ascertained.

If any analogy is to be drawn from subsection (ii), I should say that under that subsection the owner asks the Controller for permission to replant an area which the owner has selected in the first instance, and there is nothing in subsection (i) which deprives the owner of the right to select the areas on which he replaces thirty trees.

It was suggested during the argument that the Controller can take an imaginary square containing an area of one acre and superimpose that imaginary square on any part of the estate and that if within that imaginary square more than thirty replacing trees are found, an offence will be shewn to have been committed.

I think a square was suggested so as to get rid of fantastic or arbitrary shapes but there is nothing in the Enactment to suggest that such a method of ascertaining "any acre" is contemplated. Indeed it would be impossible to apply it to a long narrow holding the width of which was less than 69 yards or whatever may be the square root of 4840. Besides, if the estate or holding is larger than one acre and is not less than 70 yards in length and breadth the number of places on which the imaginary square can be superimposed is numerous and might be infinite and some of the trees might be included in an indefinite number of acres and be the subject of an indefinite number of charges.

I put this illustration:—Take a small rectangular holding of two acres the shape of two of the imaginary squares side by side. A fire or pest damages 50 trees about the centre of the holding, 25 being on each half. The owner replaces 25 trees on each of his two acres. Then, if the imaginary square is superimposed on the centre of this small holding, the fifty replacing plants are found in the acre thus arbitrarily selected. Has an offence been committed?

The learned Deputy Public Prosecutor says yes.

Now one thing which the Legislature clearly intended to permit was the planting of up to thirty rubber plants or seeds on any acre of land which was in cultivation on 1st June 1934 to replace rubber plants which were formerly growing thereon, and I see nothing in the Enactment to indicate that it was the intention of the Legislature to defeat that concession by allowing some public officer to select any area of any shape containing one acre on any part of the estate and then say to the owner "I have caught more than thirty replacements within my acre, you are guilty of an offence for which you may be punished with three months rigorous imprisonment and with a fine of $1000."

Even if this were not a penal section which must be construed strictly against the Public Prosecutor I could not construe it in the way in which we are asked to construe it.

In my opinion the Controller or Inspector cannot select "any acre" in the manner claimed in this case.

It may be that the latter part of section 23 (i) is unworkable in the absence of a provision on the lines of section 23 (ii) (a) but on the subsection as it stands there is nothing to indicate that it is not the owner who selects "any acre" on which area he will replace thirty plants.

In my opinion the magistrate was right in his decision and I would dismiss this appeal.

This decision will not defeat the policy of the Enactment so long as the owner does not alienate part of his holding. So long as the holding remains one holding it seems to me that the spirit of the Enactment is preserved provided there are not more than thirty replacements for

every acre of holding. But if he replaces on half his holding the number of plants allowed for the whole holding and then sells the other part to some other holder who may exercise the same power of replacing, the policy of the Enactment may well be defeated.

What I have envisaged may possibly also be done under subsection (ii). The owner may replant during the whole period in which the Enactment is in force an aggregate of 20%. Having replanted his 20% of the holding which he had, he then sells all that he had not replanted and the new owner of this part is entitled to replant up to 20% of it in the aggregate: and so on. It therefore looks as though by a skilful use of the conveyancer's art almost the whole of what was a holding on 1st June 1934 could be replanted if the period of restriction is substantially extended.

I mention this point because if the hole which I suspect exists in the Enactment the Legislature may possibly see fit to fill it.

PEDLOW, J.—I have had the advantage of reading in advance the judgments of the learned Chief Justice and of Mr. Justice Horne, with whom I sat on this appeal, and I respectfully agree with them that the appeal should be dismissed. I do so because I am of opinion that the language of the section—section 23 of the Rubber Regulation Enactment—is so vague in its use of the words "on any acre" that it would be unwise to convict in this case unless the total number of trees replaced exceeded an average of 30 trees to the acre over the whole holding, which is not so.

I cannot, however, subscribe to the opinion, advanced both by the prosecution and the defence, that either party can select an acre in any arbitrary manner it chooses. It is understood that in practice 120 to 150 trees are planted on an acre of ground. The Legislature had in mind, in my opinion, the replacing of one tree in roughly every 4 or 5 throughout the entire holding, which meant that there would not then be more than 30 new trees on any square acre wherever selected, but it did not distinctly say so and in case of doubt it is a well-accepted principle of criminal law that the benefit of the doubt must be given to the accused.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

MILLS J.

October 27, 1938.

AHNA LANA VELATHAN.....Appellant (Plaintiff)

vs.

VINA CHINNIAH and S. SITHAMBARAM.....Defendant-Respondent

[BATU PAHAT CIVIL APPEAL No. 2 of 1937]

Practice—F.M.S. Civil Procedure Code, Sections 343 and 568—Judgment debtor summons—Whether process constitutes execution.

On appeal to the Court of the Judge the respondent, a third party, had been ordered to pay to the appellant a sum of $159/25. Subsequently an Order was made by the Assistant Registrar for payment of this sum by monthly instalments of $6/-. On the issue of a judgment debtor summons in the Court of the Judge objection was raised on the ground that the procedure by way of judgment debtor summons is execution and that application for execution should have been made to the Court of the Magistrate.

Held that the procedure by way of judgment debtor summons under Section 343 of the F.M.S. Civil Procedure Code is not execution within the meaning of Section 568.

JUDGMENT DEBTOR SUMMONS.

Preliminary Objection.

The facts and arguments appear from the judgment.

S. K. Das for Appellant.

McIntyre for third party. (Respondent)

MILLS, J.—On the 11th December, 1937, S. Sithambaram was ordered by the Assistant Registrar of the Supreme Court at Batu Pahat to pay by instalments of $6 a month a sum of $159.25 which the Judge, on appeal from the Magistrate, ordered S. Sithambaram to pay to the appellant. S. Sithambaram having defaulted in the payment of the second and subsequent instalments, the appellant procured the issue of a notice calling upon S. Sithambaram to show cause why he should not be committed to the civil prison. When S. Sithambaram appeared to show cause on the 8th October, 1938, Counsel took the preliminary objection that the order of the Assistant Registrar was a nullity, since procedure by way of judgment debtor summons is execution and by Section 568 of the Civil Procedure Code application must be made to the Court of the Magistrate.

The question in issue is whether the procedure by way of judgment debtor summons constitutes execution within the meaning of Section 568.

Both parties based their arguments on authority and reason. The authority for the conclusion that the procedure constitutes execution, is as follows.

In re Watson, (1893) 1 Q.B. p. 20.